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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HILIARD AND BARBARA HILLIARD,)
)
Plaintiffs-Cross Defendants-Appellants) Supreme Court No. 42093
)
vs.)
)
MURPHY LAND COMPANY, LLC,)
)
Defendant-Cross Respondent-Respondent.)
_____)

APPELLANTS REPLY BRIEF

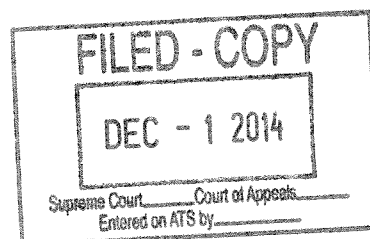
Appeal from the District Court, Third Judicial District of the State of Idaho, Owyhee
County

THE HONORABLE MOLLY J. HUSKEY, DISTRICT JUDGE

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I. ARGUMENT

A. Attorney Fees on Appeal.

Hilliards requested that they be awarded attorney fees and costs on appeal pursuant to the contract between the parties, and, in the alternative, under I.C. §§ 12-120 and 12-121. Murphy Land argues that Hilliards are foreclosed from basing their request for attorney fees on the parties' contract because they did not argue that basis for fees to the district court. However, Hilliards are not asking this Court to review the district court's failure to award attorney fees and costs to them below; rather, they are seeking fees on appeal.

Attorney fees on appeal are governed by I.A.R. 40 and 41, which require a party seeking fees on appeal to assert the claim as an issue in its first brief. The Idaho Appellate Courts have interpreted I.A.R. 41 to require the party seeking fees to state the basis for its claim. There is no requirement in I.A.R. 40 or 41 that the party requesting fees must have sought them below; nor do the rules mandate that the basis for fees on appeal must mirror the grounds below. Idaho cases do not support Murphy Land's argument,¹ nor does common sense. Indeed, it is not difficult to conceive of a case where the appeal was frivolous and the proceedings below were not, or where a party did not seek fees at the summary judgment stage because it did not prevail, but did request them on appeal when

¹ The case cited by Murphy Land, Mackowiak v. Harris, 146 Idaho 864; 204 P.3d 504 (2009), does not address the issue of attorney fees on appeal; rather it relates to *issues* not raised below.

asking to have the summary judgment overturned. Regarding contractual agreements for attorney fees, the Idaho Supreme Court has stated:

Contractual terms providing for recovery of attorney fees incurred in actions to enforce the contract represent an election between the parties to place the risk of litigation costs on the one who is ultimately unsuccessful. This Court has held that these provisions are generally honored in Idaho.²

Murphy Land's argument regarding Hilliards' request for attorney fees on appeal is without merit.

B. Abuse of Discretion in Striking Affidavits.

Murphy Land argues that the district court did not abuse its discretion in striking portions of the affidavits of Ken Edmunds, Jay Clark, James C. Hilliard and Robert F. Bennett. Murphy Land correctly states the legal standard for abuse of discretion: "A trial court does not abuse its discretion if it (1) correctly perceives the issues as discretionary, (2) acts within the bounds of discretion *and applies the correct legal standards*, and (3) reaches the decision through an exercise of reason."³ However, Murphy Land's argument ignores the elephant in the room. Did the trial court apply the correct legal standard? The trial court clearly did not understand the limitations placed upon it in summary judgment proceedings when it stated that it was "allowed to assess credibility [of witnesses]" at the

² Losee v. Idaho Co., 148 Idaho 219, 224; 220 P.3d 575, 580 (2009) (internal citations omitted).

³ Zylstra v. State, No. 41421, 2014 Opinion No. 112, 2204 Ida. LEXIS 293 (October 29, 2014)

(emphasis added).

summary judgment stage.⁴ The trial court on the record stated it did not find at least one of the witnesses credible, and that there was conflicting testimony on issues pertinent to the summary judgment.⁵ The trial court's statements make it difficult to have confidence that it applied the correct legal standard, and taint the entirety of its analysis in striking the affidavits.

Assuming, *arguendo*, that the Edmunds Affidavit was properly stricken for failure to comply with the trial court's scheduling order, the Clark Affidavit was not. Murphy Land alleges that the district court found that Clark was testifying as an expert, untimely disclosed. However, the transcript citation referenced in Murphy Land's brief states: "To the extent Mr. Clark is being offered as an expert, the Court is going to strike his affidavit in its entirety. He has not been disclosed as an expert. To the extent he is a layperson, then there will be a different standard and will allow the affidavit as to a layperson."⁶

As the district court recognized, Mr. Clark was testifying as a layperson, not an expert. After making that finding, the district court went on to strike portions of Clark's affidavit as irrelevant, and refused to consider other portions on credibility issues. The trial court stated: "Now, the Court is going to note specifically that any farming that occurred on 2011, 2012, the Court is not going to allow Mr. Clark to rely on that. It has

⁴ Tr., p. 124, ll. 19-20.

⁵ Tr., pp. 123-124.

⁶ Tr., p. 36, ll. 11-17.

been determined that he was wrongfully in possession of that property during that time frame.”⁷ Those statements, taken in conjunction with the trial court’s later statements that it found Clark not credible, clearly call into question whether the trial court applied the correct legal standards in determining the motion to strike his affidavit, and whether the entire process was tainted by the trial court’s mistaken belief that it was entitled to assess Clark’s credibility at the summary judgment stage.

C. Harmless Error.

While admitting that the district court “took issue with Clark’s credibility,” Murphy Land argues that it was harmless error for it to do so. Murphy Land’s argument ignores the well-established foundation for evaluating a motion for summary judgment. As the Idaho Supreme Court stated: “It is well-settled that a trial court is not allowed to weigh the evidence or assess the credibility of witnesses on summary judgment.”⁸ Violation of the basic rule against assessment of witness credibility cannot be harmless error.

Reviewing the trial court’s assessment of Clark’s affidavit, it is clear that the court’s judgment was colored by its belief that the witness was not credible. The court refused to consider testimony about the 2011 and 2012 crop years because it found Clark was in wrongful possession of the property during that time. It found Clark’s testimony that the ground had been prepared for planting in 2011 to be irrelevant, notwithstanding the

⁷ Tr., p. 37, ll. 1-6.

⁸ Idaho State University v. Mitchell, 97 Idaho 724, 730; 552 P.2s 776, 782 (1976).

fact that Murphy Land claimed it had expenses for ground preparation, to its damage. It refused to consider that testimony because “the reason that he knew the facts that predicated B is that he was unwilling to vacate the property, despite being told to do so.”⁹ The trial court then stated that it would not allow Clark to testify because he “was wrongfully in possession.”¹⁰ The trial court refused to consider Clark’s testimony regarding historical production of the land, omitted costs which had been historically incurred, acres actually farmed, and other matters of which Clark had personal knowledge. The entire process was colored, distorted and tainted by the trial court’s belief that Clark was not credible, and that it could make that assessment at the summary judgment stage of the proceedings.

D. Summary Judgment Standard.

Murphy Land would have this Court disregard the well-established standards for summary judgment: that motions for summary judgment should be granted with caution,¹¹ and that a motion for summary judgment should be denied if the relevant documents raise any question of credibility of witnesses or weight of the evidence.¹² Instead, Murphy Land posits that the trial court’s credibility finding “might not be error” and should therefore be

⁹ Tr., p. 40, ll. 15-18.

¹⁰ Tr., p. 39, ll. 1-10.

¹¹ Bonz v. Sudweeks, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991);

¹² Merrill v. Duffy Reed Constr. Co., 82 Idaho 410, 414; 353 P.2d 647, 659 (1960).

upheld. It further asks the Court to excuse the trial judge's "sham affidavit" analysis because it may have been following dicta from the Court of Appeals decision in *Keeven*.¹³ However, as Murphy Land acknowledges, the Idaho Supreme Court decision in *Major v. Sec. Equip. Corp.*¹⁴ came down several months before the trial court ruled on the summary judgment motion in the instant case. The *Major* Court specifically stated that the Idaho Supreme Court has never adopted the sham affidavit doctrine,¹⁵ and that "a sham affidavit finding necessarily turns on a credibility finding as well as a finding of bad faith. That is beyond the power of the trial courts at the summary judgment phase."¹⁶ Nevertheless, the trial court clearly found that Clark's two affidavits contradicted each other, and utilized that finding both in striking portions of Clark's affidavit filed in this action, and in determining damages.¹⁷ Those findings constituted error and an abuse of discretion.

The district court ignored its duty to liberally construe facts in favor of Hilliards; indeed, it divested itself of that duty by improperly striking all of Hilliards' relevant evidence. The court impermissibly expanded its powers as the ultimate trier of fact based upon the *Ritchie* doctrine to include determination of witness credibility. The district court

¹³ 126 Idaho 290, 298; 882 P.2d 457, 465 (Ct. App. 1994).

¹⁴ 155 Idaho 199; 307 P.3d 1225 (2013).

¹⁵ *Major*, supra, 155 Idaho at 204.

¹⁶ *Id.*, 155 Idaho at 205.

¹⁷ Tr., pp. 116-117.

relied upon speculative evidence in determining damages, basing such reliance on its assumption that Hilliards had provided no rebuttal evidence; again, only because the court had stricken all of Hilliards' evidence rebutting Murphy Land's damage claims.

Murphy Land's arguments would have this Court ignore its own well-established standards, and uphold a patently defective grant of summary judgment. They are flawed, and should not be relied upon.

E. Tiegs Affidavit.

Murphy Land argues that the trial court had no responsibility to *sua sponte* review the admissibility of the Tiegs Affidavit. However, that assertion ignores the rule that "evidence presented in support of or in opposition to a motion for summary judgment must be admissible."¹⁸ A trial court is empowered to review proffered evidence on its own motion.¹⁹ In this case, the trial court recognized there may be a factual question about damages²⁰ and that the damages claimed by Murphy Land may be speculative; however, the court then found that because Hilliards failed to "sufficiently refute" Tiegs' conclusions, the court had no alternative but to allow them to stand.²¹ Without re-plowing the ground regarding the Clark affidavit, which did refute Tiegs' conclusions, the trial court

¹⁸ Hecla Min. Co. v. Star-Morning Min. Co., 122 Idaho 778, 785; 839 P.2d 1192, 1199 (1992).

¹⁹ *Id.*; see also Ryan v. Beisner, 123 Idaho 42, 44; 844 P.2d 24, 25 (Ct. App. 1992).

²⁰ Tr., pp. 114-118.

²¹ Tr. Pp. 117-118, ll. 20-7.

was mistaken in its belief that it had no other alternative. The court's failure to exercise its gatekeeping function on the threshold question of admissibility of evidence, which should have led it to subject the Tiegs' affidavit to the same standard as were the affidavits of Hillards, was an abuse of discretion.

II.

CONCLUSION

The trial court failed to understand and follow the proper standard for summary judgment in Idaho. It abused its discretion when it assessed the credibility of witnesses. It abused its discretion when it weighed Clark's previous affidavit against the one filed in this case. The trial court erred when it analyzed the affidavits proffered by Hilliards, and it erred when it accepted, without scrutiny, Murphy Land's affidavits. Summary judgment cannot lie under these circumstances, and the judgment of the trial court should be reversed.

RESPECTFULLY SUBMITTED this 1 day of November, 2014.



M. Karl Shurtliff

Weldon S. Wood

Attorneys for Appellants

VII. CERTIFICATE OF SERVICE

I hereby certify that I caused to be served two true and correct copies of the foregoing, to the following, by the indicated method on this 1 day of November, 2014, by U.S. mail, hand delivery or facsimile, with the necessary postage affixed thereto.

Steven F. Schossberger

Matthew Gordon

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☒ U.S. Mail

☐ Fax

☐ Hand Delivered



M. Karl Shurtliff